Supreme Court, U.S.
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No. 97-1864

# In the Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS CANTOR, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether application of 18 U.S.C. 666 to bribery of an official of a state agency receiving substantial federal funds exceeds Congress's spending power under Article I, § 8, Cl. 1, or violates the Tenth Amendment or other principles of federalism.

2. Whether bribes made to expedite the payment of funds legitimately due to the persons paying the bribes are covered by Section 666.

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### OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A1-A6) is unpublished, but the decision is noted at 141 F.3d 1152 (Table). The order of the district court (Pet. App. C1-C3) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 20, 1998. The petition for a writ of certiorari was filed on May 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribing and conspiring to

bribe an official of a state agency that receives federal funds, in violation of 18 U.S.C. 371, 666. Petitioner was sentenced to three years' probation, to include five months' home detention, and fined $40,000. The court of appeals affirmed. Pet. App. A1-A6.

1. Petitioner is an attorney who represented clients in the construction industry. He arranged for his clients to bribe the Chief of the Commercial Division in the Office of Legal Services at the New York City Board of Education (BOE) in order to expedite the disbursement of "retainage" payments that the BOE owed to petitioner's clients. Pet. App. A2. The retainage payments were amounts due to the construction companies that were held back until satisfactory completion of the projects involved. There appears to have been a pattern of improper withholding of the retainage payments by the BOE. *Id.* at A2 n.1.

2. Petitioner was convicted of conspiracy to bribe and bribery under 18 U.S.C. 666(a)(1)(B), which proscribes bribery of an agent of any state or local organization or agency that receives more than $10,000 a year under a federal assistance program when the bribe is in connection with a matter with a value of $5000 or more.

3. The court of appeals affirmed petitioner's convictions. Pet. App. A2. It first rejected his contention that some of the bribes were not covered by Section 666 because they involved an entity that was not receiving federal funds. *Id.* at A3. As pertinent here, the statute applies only if the agency involved in the bribery receives in excess of $10,000 under a federal assistance program within a one-year period that includes the bribery offense. 18 U.S.C. 666(b) and (d)(5). The court of appeals determined that the con-

tracts to which the bribes pertained were contracts of the BOE (and it was stipulated that the BOE received the requisite federal funds). Pet. App. A3; Gov't C.A. Br. 42.

The court also rejected petitioner's argument that the government failed to show that the bribes met the statutory requirement that the transactions to which the bribes pertained had a value to the BOE of $5000 or more. Pet. App. A3-A4. Section 666 requires that the bribe be "in connection with any business * * * of such * * * agency [receiving federal funds] involving anything of value of $5000 or more." 18 U.S.C. 666(a)(2). The court noted that circuit precedent had construed that requirement to mean that the business have a value of at least $5000 to the agency itself, not just to someone outside the agency. Pet. App. A4; see *United States* v. *Foley*, 73 F.3d 484, 488-492 (2d Cir. 1996). In petitioner's case, the court of appeals found that the value to BOE of the agency's retention of the retainage fees "easily" met the $5000 requirement, even under *Foley*. Pet. App. 4A.

The court also rejected petitioner's related claim that the indictment failed to allege the $5000 element in a manner that included *Foley*'s interpretation of the statute. Pet. App. A4-A5. Because petitioner failed to object to the indictment in the district court, the court of appeals reviewed that contention for plain error and held that the indictment did not "deprive[] [petitioner] of fair notice of the crimes against which he would have to defend himself." *Id.* at A5.

The court also rejected petitioner's claims that, to violate Section 666, the bribe must directly involve the federal funds received by the agency or, if there is no such requirement, that the application of Section 666 in petitioner's case violated the Tenth Amend-

ment. Pet. App. A5. The court of appeals observed that in *Salinas* v. *United States*, 118 S. Ct. 469, 474 (1997), this Court rejected as a matter of statutory construction the argument that the bribes must have an impact on the federal funds. Pet. App. A5. The court also observed that *Salinas* rejected constitutional objections to the application of Section 666 on the facts of the *Salinas* case. The court of appeals concluded that the facts of petitioner's case are indistinguishable from those of *Salinas* in that respect. *Id.* at A5-A6 n.5.

Finally, the court of appeals rejected without discussion petitioner's other claims: that the evidence was insufficient to establish that petitioner had acted "corruptly" within the meaning of Section 666, that the government's investigative techniques violated the Due Process Clause, and that the district court abused its discretion in not suppressing certain evidence. Pet. App. A6.

## ARGUMENT

1. Petitioner seeks this Court's review of his constitutional claim that application of Section 666 in his case extends beyond Congress' constitutional authority. Pet. 10-15. That contention was considered and rejected in *Salinas*. In that case, bribes were paid to county jailors so that a federal prisoner housed in the county jail would receive favorable treatment. 118 S. Ct. at 472. The federal funding requirement was met in *Salinas* by the federal funds provided to the county pursuant to a federal program to assist the improvement of the jail, subject to the county's agreement to house federal prisoners, and by the annual federal payments for the housing of those prisoners. See *ibid.* The bribes in *Salinas* had no direct effect on

federal funds. *Id.* at 473. Salinas argued that application of Section 666 exceeded Congress' constitutional power if the bribery did not have a direct effect on the federal funds. *Id.* at 473-475. This Court rejected that contention, finding that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case" because the beneficiary of the bribery "was without question a prisoner held in a jail managed pursuant to a series of agreements with the Federal Government [and] [t]he preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program." *Id.* at 475.

Similarly, the court of appeals in this case correctly rejected petitioner's constitutional claim based on its finding that the facts of petitioner's case, like those of *Salinas*, showed a sufficient connection between the bribe and the federal funds at stake. Petitioner stipulated that the BOE received federal funds sufficient to satisfy Section 666. Indeed, he stipulated that "in each of the fiscal years ending June 30, 1985, through June 30, 1994, the BOE received between $396 million and $884 million." Gov't C.A. Br. 42. The management of the construction projects to which the retainage payments related was a programmatic function of the BOE. Corruption in the administration of the financial affairs of the BOE, therefore, "was a threat to the integrity and proper operation of the federal program" under which funding was provided to the BOE. *Salinas*, 118 S. Ct. at 475. Although the federal funds were not (and need not have been) affected, the bribery touched on the integrity and proper operation of the agency receiving the federal funds.

Petitioner fails to identify any factual distinction of constitutional significance between this case and *Salinas*. Nor is there a conflict among the courts of appeals on the constitutionality of Section 666. Review of his claim is therefore unwarranted.

2. Petitioner also seeks review by this Court of a question that was not addressed by the court of appeals. Section 666(c) provides that "[t]his section "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. 666(c). In challenging the sufficiency of the evidence to prove that he acted "corruptly" in making the bribes, petitioner suggested that he "could not have acted 'corruptly' within the meaning of the statute, at least as to [two of the bribers petitioner aided], because his conduct involved *bona fide* 'compensation' within the meaning of §666(c), i.e., the retainages due his clients." Pet. C.A. Br. 43. Petitioner clarified in his reply brief that he was arguing that "subsection (c) simply states the truism that where a payment made or a result sought is legitimate, or 'bona fide,' the payment cannot be considered 'corrupt.'" Pet. C.A. Reply Br. 13. The court of appeals summarily rejected that argument. Pet. App. A6. At least two rationales underlie the court's decision: a briber may act corruptly if he knows his bribe is unlawful, even if he is making the bribe to obtain monies he believes are rightfully owed him; alternatively, as petitioner conceded, his argument would not serve to rebut the evidence of corrupt intent with respect to the other bribers to whom the retainage amounts sought were not legitimately owed.

Petitioner now asserts an entirely different argument based on Section 666(c). He contends (Pet. 16-

19) that subsection (c) completely exempts from the coverage of Section 666 a corrupt bribe made for the purpose of obtaining legitimately owed fees or compensation because (he asserts) subsection (c) precludes consideration of fees or compensation with respect to any element of the offense—in petitioner's case, the element that the bribe be made "in connection with any business [or] transaction * * * involving anything of value of $5000 or more." See Pet. 18.

Subsection (c) has no application to the payments influenced by the bribes in this case. That subsection applies only to "salary, wages, fees, or other compensation paid, or expenses paid or received." That list of words encompasses payments to individuals for work performed (and incidental expenses)—not major contractual payments made in a commercial setting, such as the construction payments that the bribes here were paid to influence. See Pet. App. C2. In any event, petitioner's theory would except corrupt bribes from Section 666 if the bribe was paid to influence a transaction involving bona fide salary, wages, compensation or expenses, and there is no warrant for reaching that anomalous result. Although one court of appeals recently has accepted the argument,[1] there is no warrant for this Court to review the question in this case. The issue

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[1] See *United States* v. *Mills*, 140 F.3d 630, 633 (6th Cir. 1998) (salaries received by employees who bribed agency officials to get their jobs cannot be considered in determining whether $5000 threshold has been met). In our view, the exclusion of subsection (c) applies only to the bribery (and gratuity) component of the statute. It is intended to avoid criminalizing the agency official's receipt of "anything of value" when the thing of value is bona fide compensation, fees, or reimbursement of expenses.

was not properly presented to the court of appeals in the form in which it is now asserted and the court of appeals did not pass on that contention. Petitioner may therefore not assert that claim for the first time here. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quotation marks and citations omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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